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THE HISTORY OF ASSUMPSIT.

II. — IMPLIED ASSUMPSIT.

NOTHING impresses the student of the Common Law more than its extraordinary conservatism. The reader will easily call to mind numerous rules in the law of Real Property and Pleading which illustrate the persistency of archaic reverence for form and of scholastic methods of interpretation. But these same characteristics will be found in almost any branch of the law by one who carries his investigations as far back as the beginning of the seventeenth century. The history of Assumpsit, for example, although the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediæval conceptions.

We have had occasion, in the preceding part of this paper, to see that an express *assumpsit* was for a long time essential in the actions of tort against surgeons or carpenters, and bailees. It also appeared that in the action of tort for a false warranty the vendor's affirmation as to quality or title was not admissible, before the time of Lord Holt, as a substitute or an express undertaking. We are quite prepared, therefore, to find that the action of Assumpsit proper was, for generations, maintainable only upon an express promise. Furthermore, Assumpsit would not lie in certain cases even though there were an express promise. For example, a defendant who promised to pay a sum certain in ex-

change for a *quid pro quo* was, before Slade's case,[1] chargeable only in Debt unless he made a second promise to pay the debt.

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with Debt upon a simple contract in all cases. Secondly, proof of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus Assumpsit* became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money. These three developments will be considered separately.

Although *Indebitatus Assumpsit* upon an express promise was valuable so far as it went, it could not be resorted to by plaintiffs in the majority of cases as a protection from wager of law by their debtors. For the promise to be proved must not only be express, but subsequent to the debt. In an anonymous case, in 1572, Manwood objected to the count that the plaintiff "ought to have said *quod postea assumpsit*, for if he assumed at the time of the contract, then Debt lies, and not Assumpsit; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod* Whiddon and Southcote, JJ., with the assent of Catlin, C.J., *concesserunt*."[2] The consideration in this class of cases was accordingly described as a "debt precedent."[3] The necessity of a subsequent promise is conspicuously shown by the case of Maylard *v.* Kester.[4] The allegations of the count were, that, in consideration that the plaintiff would sell and deliver to the defendant certain goods, the latter promised to pay therefor a certain price; that the plaintiff did sell and deliver the goods, and that the defendant did not pay according to his promise and undertaking. The plaintiff had a verdict and judgment thereon in the Queen's Bench; but the judgment was reversed in the Exchequer Chamber "because Debt lies properly, and not an action on the case; the matter proving a perfect sale and contract."

What was the peculiar significance of the subsequent promise? Why should the same courts which, for sixty years before Slade's case, sanctioned the action of Assumpsit upon a promise in consideration of a precedent debt, refuse, during the same period, to

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[1] 4 Rep. 92 a. [2] Dal. 84, pl. 35.
[3] Manwood *v.* Burston, 2 Leon. 203, 204; *supra*, 16, 17.
[4] Moore, 711 (1601).

allow the action, when the receipt of the *quid pro quo* was contemporaneous with or subsequent to the promise? The solution of this puzzle must be sought, it is believed, in the nature of the action of Debt. A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant.[1] A bargain and sale, and a loan, were exchanges of values. The action of debt, as several writers have remarked, was a real rather than a personal action. The judgment was not for damages, but for the recovery of a debt, regarded as a *res*. The conception of a debt was clearly expressed by Vaughan, J., who, some seventy years after Slade's case, spoke of the action of Assumpsit as "much inferior and ignobler than the action of Debt," and characterized the rule that every contract executory implies a promise as "a false gloss, thereby to turn actions of Debt into actions on the case; for contracts of debt are reciprocal grants."[2]

Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of Assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. This implied a liberality of interpretation to which the lawyers of the sixteenth century had not generally attained. To them it seemed more natural to consider that the force of the words of agreement was spent in creating the debt. Hence the necessity of a new promise, if the creditor desired to charge his debtor in Assumpsit.

As the actions of Assumpsit multiplied, however, it would naturally become more and more difficult to discriminate between promises to pay money and promises to do other things. The recognition of an agreement to pay money for a *quid pro quo* in its double aspect, that is, as being both a grant and a promise, and the consequent admissibility of Assumpsit, with its procedural advantages, as a concurrent remedy with Debt were inevitable. It was accordingly resolved by all the justices and barons in Slade's case, in 1603, although "there was no other promise or assumption but the said bargain," that "every contract executory imports

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[1] See Langdell, Contracts, § 100.

[2] Edgecomb *v.* Dee, Vaugh. 89, 101.

in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it; and, therefore, when one sells any goods to another, and agrees to deliver them at a day to come, and the other, in consideration thereof, agrees to pay so much money at such a day, in that case both parties may have an action of Debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of Debt." Inasmuch as the judges were giving a new interpretation to an old transaction; since they, in pursuance of the presumed intention of the parties, were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an "implied *assumpsit*." But the promise was in no sense a fiction. The fictitious *assumpsit*, by means of which the action of *Indebitatus Assumpsit* acquired its greatest expansion, was an innovation many years later than Slade's case.

The account just given of the development of *Indebitatus Assumpsit*, although novel, seems to find confirmation in the parallel development of the action of Covenant. Strange as it may seem, Covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, Debt was the appropriate action for their recovery. The writer has discovered no case in which a plaintiff succeeded in an action of Covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of Debt upon such a claim, in the Queen's Bench, in 1585, "it was holden by the Court that an action of Covenant lay upon it, as well as an action of Debt, at the election of the plaintiff."[1] The same right of election was conceded by the Court in two cases[2] in 1609, in terms which indicate that the privilege was of recent introduction. It does not appear in what court these cases were decided; but it seems probable that they were in the King's Bench, for, in Chawner *v.* Bowes,[3] in the Common Bench, four years later, Warburton and Nichols, JJ., said: "If a man covenant to pay £10 at a day certain, an action of debt

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[1] Anon., 3 Leon. 119.

[2] Anon., 1 Roll. Ab. 518, pl. 3; Strong *v.* Watts, 1 Roll. Ab. 518, pl. 2. See also Mordant *v.* Watts, Brownl. 19; Anon., Sty. 31; Frere *v.* ——, Sty. 133; Norrice's Case, Hard. 178.

[3] Godb. 217.

lieth for the money, and not an action of covenant." As late as 1628, in the same court, Berkeley, Serjeant, in answer to the objection that Covenant did not lie, but Debt, against a defendant who had covenanted to perform an agreement, and had obliged himself in a certain sum for its performance, admitted that, "if a covenant had been for £30, then debt only lies; but here it is to perform an agreement."[1] Precisely when the Common Bench adopted the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I.

That Covenant became concurrent with Debt on a specialty so many years after Assumpsit was allowed as a substitute for Debt on a simple contract, was doubtless due to the fact that there was no wager of law in Debt on a sealed obligation.

Although the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in Debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in Debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,[2] money lent,[3] money paid at the defendant's request,[4] money had and received to the plaintiff's use,[5] work and labor at the defendant's request,[6] or upon an account stated,[7] and that the

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[1] Brown *v.* Hancock, Hetl. 110, 111.

[2] Hughes *v.* Rowbotham (1592), Poph. 30, 31; Woodford *v.* Deacon (1608), Cro. Jac. 206; Gardiner *v.* Bellingham (1612), Hob. 5, 1 Roll. R. 24, s. c.

[3] Rooke *v.* Rooke (1610), Cro. Jac. 245, Yelv. 175, s. c.

[4] Rooke *v.* Rooke, *supra*; Moore *v.* Moore (1611), 1 Bulst. 169.

[5] Babington *v.* Lambert (1616), Moore, 854.

[6] Russell *v.* Collins (1669), 1 Sid. 425, 1 Mod. 8, 1 Vent. 44, 2 Keb. 552, s. c.

[7] Brinsley *v.* Partridge (1611), Hob. 88; Vale *v.* Egles (1605), Yelv. 70, Cro. Jac. 69.

defendant being so indebted promised to pay. This was the origin of the common counts.

In all the cases thus far considered there was a definite bargain or agreement between the plaintiff and defendant. But instances, of course, occurred in which the parties did not reduce their transactions to the form of a distinct bargain. Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at the present day, but for centuries there was no common-law action by which compensation could be recovered. Debt could not be maintained, for that action was always for the recovery of a liquidated amount.[1] Assumpsit would not lie for want of a promise. There was confessedly no express promise; to raise by implication a promise to pay as much as the plaintiff reasonably deserved for his goods or services was to break with the most venerable traditions. The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.

There seems to have been no recognition of the right to sue upon an implied *quantum meruit* before 1609. The innkeeper was the first to profit by the innovation. Reciprocity demanded that, if the law imposed a duty upon the innkeeper to receive and keep safely, it should also imply a promise on the part of the guest to pay what was reasonable.[2] The tailor was in the same case with the innkeeper, and his right to recover upon a *quantum meruit* was recognized in 1610.[3] Sheppard,[4] citing a case of the year 1632, says: "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages." But it was only four years before that the

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[1] "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Y. B. 12 Ed. IV. 9, pl. 22, per Brian, C. J. To the same effect, Young *v.* Ashburnham (1587), 3 Leon. 161; Mason *v.* Welland (1688), Skin. 238, 242.

[2] "It is an implied promise of every part, that is, of the part of the innkeeper, that he will preserve the goods of his guest, and of the part of the guest, that he will pay all duties and charges which he caused in the house." Warbrooke *v.* Griffin, 2 Brownl. 254, Moore, 876, 877, s. c.

[3] Six Carpenters' Case, 8 Rep. 147 a. But the statement that the tailor could recover in Debt is contradicted by precedent and following authorities.

[4] Actions on the Case (2 ed.), 50.

Court in a similar case were of opinion that an action lay if the party either before or after the services rendered promised to pay for them, "but not without a special promise."[1] In Nichols *v.* More[2] (1661) a common carrier resisted an action for negligence, because, no price for the carriage being agreed upon, he was without remedy against the bailor. The Court, however, answered that "the carrier may declare upon a *quantum meruit* like a tailor, and therefore shall be charged."[3] As late as 1697, Powell, J., speaking of the sale of goods for so much as they were worth, thought it worth while to add: "And note the very taking up of the goods implies such a contract."[4]

The right of one, who signed a bond as surety for another without insisting upon a counter bond or express promise to save harmless, to charge his principal upon an implied contract of indemnity, was developed nearly a century later. In Bosden *v.* Thinne[5] (1603) the plaintiff at the defendant's request had executed a bond as surety for one F, and had been cast in a judgment thereon. The judges all agreed that upon the first request only Assumpsit did not lie, Yelverton, J., adding: "For a bare request does not imply any promise, as if I say to a merchant, I pray trust J. S. with £100, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid, or the like." The absence of any remedy at law was conceded in 1662.[6] It was said by Buller, J., in Toussaint *v.* Martinnant,[7] "that the first case in which a surety, who had paid the creditor, succeeded in an action at law against the principal for indemnity, was before Gould, J.,[8] at Dorchester, which was decided on equitable grounds." The innovation seems to be due, however, to Lord Mansfield, who ruled in favor of a surety in Decker *v.* Pope, in 1757, "observing that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law."[9]

The late development of the implied contract to pay *quantum*

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[1] Thursby *v.* Warren, W. Jones, 208.

[2] 1 Sid. 36. See also Boson *v.* Sandford (1689), per Eyres, J.

[3] The defendant's objection was similar to the one raised in Y. B. 3 H. VI. 36, pl. 33, *supra*, 11, n. 2.

[4] Hayward *v.* Davenport, Comb. 426. [5] Yelv. 40.

[6] Scott *v.* Stephenson, 1 Lev. 71, 1 Sid. 89, s. c. But see Shepp. Act on Case (2 ed.) 49.

[7] 2 T. R. 100, 105. [8] Justice of the Common Pleas, 1763–1794.

[9] 1 Sel. N. P. (13 ed.) 91.

meruit, and to indemnify a surety, would be the more surprising, but for the fact that Equity gave relief to tailors and the like, and to sureties long before the common law helped them. Spence, although at a loss to account for the jurisdiction, mentions a suit brought in Chancery, in 1567, by a tailor, to recover the amount due for clothes furnished. The suit was referred to the queen's tailor, to ascertain the amount due, and upon his report a decree was made. The learned writer adds that "there were suits for wages and many others of like nature." [1] A surety who had no counter bond filed a bill against his principal, in 1632, in a case which would seem to have been one of the earliest of the kind, for the reporter, after stating that there was a decree for the plaintiff, adds "*quod nota.*" [2]

The account just given of the promise implied in fact seems to throw much light upon the doctrine of "executed consideration." One who had incurred a detriment at the request of another, by rendering service, or by becoming a surety with the reasonable expectation of compensation or indemnity, was as fully entitled, in point of justice, to enforce his claim at law, as one who had acted in a similar way upon the faith of an express promise. Nothing was wanting but an express *assumpsit* to make a perfect cause of action. If the defendant saw fit to make an express *assumpsit*, even after the detriment was incurred, the temptation to treat this as removing the technical objection to the plaintiff's claim at law might be expected to be, as it proved to be, irresistible.[3] The already established practice of suing upon a promise to pay a precedent debt made it the more easy to support an action upon a promise when the antecedent act of the plaintiff at the defendant's request did not create a strict debt.[4] To bring the new doctrine into harmony with the accepted theory of consideration, the promise was "coupled with" the prior request by the fiction of relation,[5] or, by a similar fiction, the consideration was brought forward or continued to the promise.[6] This fiction doubt-

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[1] 1 Spence, Eq. Jur. 694.

[2] Ford *v.* Stobridge, Nels. Ch. 24.

[3] The view here suggested is in accordance with what has been called, in a questioning spirit, the "ingenious explanation" of Professor Langdell. Holmes, Common Law, 286. The general tenor of this paper will serve, it is hoped, to remove the doubts of the learned critic.

[4] Sidenham *v.* Worlington (1585), 2 Leon. 224.

[5] Langdell, Contracts, § 92.

[6] Langdell, Contracts, § 92; 1 Vin. Ab. 280, pl. 13.

less enabled plaintiffs sometimes to recover, although the promise was not identical with what would be implied, and in some cases even where it would be impossible to imply any promise.[1] But after the conception of a promise implied in fact was recognized and understood, these anomalies gradually disappeared, and the subsequent promise came to be regarded in its true light of cogent evidence of what the plaintiff deserved for what he had done at the defendant's request.

The non-existence of the promise implied, in fact, in early times, also makes intelligible a distinction in the law of lien, which greatly puzzled Lord Ellenborough and his colleagues. Williams, J., is reported to have said in 1605: "If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making."[2] In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien.[3] As soon as the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien.[4] The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century.[5] At length, in 1816, the judges of the King's Bench, unable to see any reason in the distinction, and unconscious of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract.[6]

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[1] Langdell, Contracts, §§ 93, 94.

[2] 2 Roll. Ab. 92, pl. 1, 2.

[3] An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse thereafter was like a *damnosa hereditas*. The Hostler's case (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. Jones *v.* Pearle, 1 Stra. 556.

[4] "And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat." Watbrooke *v.* Griffith (1609), Moore, 876, 877.

[5] Chapman *v.* Allen, Cro. Car. 271; Collins *v.* Ongly, Selw. N. P. (13 ed.) 1312, n. (x), per Lord Holt; Brennan *v.* Currint (1755), Say. 224, Buller, N. P. (7 ed.) 45, n. (c); Cowell *v.* Simpson, 16 Ves. 275, 281, per Lord Eldon; Scarfe *v.* Morgan, 4 M. & W. 270, 283, per Parke, B.

[6] Chase *v.* Westmore, 5 M. & Sel. 180.

The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books.[1] But in Chapman *v.* Allen[2] (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in Jackson *v.* Cummins,[3] this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and "bailees who spend their labor and skill in the improvement of the chattels" delivered to them.[4]

The value of the discovery of the implied promise in fact was exemplified further in the case of a parol submission to an award. If the arbitrators awarded the payment of a sum of money, the money was recoverable in debt, since an award, after the analogy of a judgment, created a debt. But if the award was for the performance of a collateral act, as, for example, the execution of a release, there was, originally, no mode of compelling compliance with the award, unless the parties expressly promised to abide by the decision of the arbitrators. Tilford *v.* French[5] (1663) is a case in point. So, also, seven years later, "it was said by Twisden, J., that if two submit to an award, this contains not a reciprocal promise to perform; but there must be an express promise to ground an action upon."[6] This doctrine was abandoned by the time of Lord Holt, who, after referring to the ancient rule, said: "But the contrary has been held since; for if two men submit to the award of a third person, they do also thereby promise expressly to abide by this determination, for agreeing to refer is a promise in itself."[7]

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[1] 2 Roll. Ab. 85, pl. 4 (1604); Mackerney *v.* Erwin (1628), Hutt. 101; Chapman *v.* Allen (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

[2] 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

[3] 5 M. & W. 342.

[4] The agistor has a lien by the Scotch law. Schouler, Bailments (2 ed.), § 122.

[5] 1 Lev. 113, 1 Sid. 160, 1 Keb. 599, 635. To the same effect, Penruddock *v.* Monteagle (1612), 1 Roll. Ab. 7, pl. 3; Browne *v.* Downing (1620), 2 Roll. R. 194; Read *v.* Palmer (1648), Al. 69, 70.

[6] Anon., 1 Vent. 69.

[7] Squire *v.* Grevell (1703), 6 Mod. 34, 35. See similar statements by Lord Holt in Allen v. Harris (1695), 1 Ld. Ray. 122; Freeman *v.* Barnard (1696), 1 Ld. Ray. 248; Purslow *v.* Baily (1704), 2 Ld. Ray. 1039; Lupart *v.* Welson (1708), 11 Mod. 171.

In the cases already considered the innovation of Assumpsit upon a promise implied in fact gave a remedy by action, where none existed before. In several other cases the action upon such a promise furnished not a new, but a concurrent remedy. Assumpsit, as we have seen,[1] was allowed, in the time of Charles I., in competition with Detinue and Case against a bailee for custody. At a later period Lord Holt suggested that one might "turn an action against a common carrier into a special assumpsit (which the law implies) in respect of his hire."[2] Dale *v.* Hall[3] (1750) is understood to have been the first reported case in which that suggestion was followed. Assumpsit could also be brought against an innkeeper.[4]

Account was originally the sole form of action against a factor or bailiff. But in Wilkins *v.* Wilkins[5] (1689) three of the judges favored an action of Assumpsit against a factor because the action was brought upon an express promise, and not upon a promise by implication. Lord Holt, however, in the same case, attached no importance to the distinction between an express and an implied promise, remarking that "there is no case where a man acts as bailiff, but he promises to render an account." The requisite of an express promise was heard of no more. Assumpsit became theoretically concurrent with Account against a bailiff or factor in all cases, although by reason of the competing jurisdiction of equity, actions at common law were rare.[6]

In the early cases of bills and notes the holders declared in an action on the case upon the custom of merchants. "Afterwards they came to declare upon an *assumpsit*."[7]

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ

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[1] *Supra*, 7. [2] Comb. 334.
[3] 1 Wils. 281. See, also, Brown *v.* Dixon, 1 T. R. 274, per Buller, J.
[4] Morgan *v.* Ravey, 6 H. & N. 265. But see Stanley *v.* Bircher, 78 Mo. 245.
[5] Carth. 89, 1 Salk. 9. [6] Tompkins *v.* Willshaer, 5 Taunt. 430.
[7] Milton's Case (1668), Hard. 485, per Lord Hale.

from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts."[1]

Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.

As Assumpsit cannot be brought upon a record, the first class of quasi-contracts need not be considered here. Many of the statutory, official, or customary duties, also, *e.g.*, the duty of the innkeeper to entertain,[2] of the carrier to carry,[3] of the smith to shoe,[4] of the chaplain to read prayers, of the rector to keep the rectory in repair,[5] of the *fidei-commiss* to maintain the estate,[6] of the finder to keep with care,[7] of the sheriff and other officers to perform the functions of their office,[8] of the ship-owner to keep medicines on his ship,[9] and the like, which are enforced by an action on the case, are beyond the scope of this essay, since *Indebitatus Assumpsit* lies only where the duty is to pay money. For the same reason we are not concerned here with a large class of duties growing out of the principle of unjust enrichment, namely, constructive or quasi trusts, which are enforced, of course, only in equity.

Debt was originally the remedy for the enforcement of a statutory or customary duty for the payment of money. The right to sue in *Indebitatus Assumpsit* was gained only after a struggle. The *assumpsit* in such cases was a pure fiction. These cases were not, therefore, within the principle of Slade's case, which required, as we have seen,[10] a genuine agreement. The authorities leave no room for doubt upon this point, although it is a common opinion

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1 In Finch, Law, 150, they are called "as it were" contracts.

2 Keil. 50, pl. 4.

3 Jackson *v.* Rogers, 2 Show. 327; Anon., 12 Mod. 3.

4 Steinson *v.* Heath, Lev. 400.

5 Bryan *v.* Clay, 1 E. & B. 38.

6 Batthyany *v.* Walford, 36 Ch. Div. 269.

7 Story, Bailments (8 ed.), §§ 85–87.

8 3 Bl. Com. 165.

9 Couch *v.* Steel, 3 E. & B. 402. But see Atkinson *v.* Newcastle Co., 2 Ex. Div. 441.

10 *Supra*, 55, 56.

that, from the time of that case, *Indebitatus Assumpsit* was concurrent with Debt in all cases, unless the debt was due by record, specialty, or for rent.

The earliest reported case of *Indebitatus Assumpsit* upon a customary duty seems to be City of London *v.* Goree,[1] decided seventy years later than Slade's case. "Assumpsit for money due by custom for scavage. Upon *non-Assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether Assumpsit lies for this money thus due by custom, without express promise, was the question. Resolved it does." On the authority of that case, an officer of a corporation was charged in Assumpsit, three years later, for money forfeited under a by-law.[2] So, also, in 1688, a copyholder was held liable in this form of action for a customary fine due on the death of the lord, although it was objected "that no *Indebitatus Assumpsit* lieth where the cause of action is grounded on a custom."[3] Lord Holt had not regarded these extensions of *Indebitatus Assumpsit* with favor. Accordingly, in York *v.* Toun,[4] when the defendant urged that such an action would not lie for a fine imposed for not holding the office of sheriff, "for how can there be any privity of assent implied when a fine is imposed on a man against his will?" the learned judge replied: "We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, by-laws, rights to impose fines, charters, and everything, should be left to a jury." By another report of the same case,[5] "Holt seemed to incline for the defendant. . . . And upon motion of the plaintiff's counsel, that it might stay till the next term, Holt, C.J., said that it should stay till dooms-day with all his heart; but Rokesby, J., seemed to be of opinion that the action would lie. — *Et adjournatur.* Note. A day or two after I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house, and Holt repeated the said case to him, as a new attempt to extend the *Indebitatus Assumpsit*, which had been too much encouraged already, and Treby, C.J., seemed also to be of the same opinion with Holt."

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[1] Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433, S.C.

[2] Barber Surgeons *v.* Pelson (1679), 2 Lev. 252. To the same effect, Mayor *v.* Hunt (1681), 37, Assumpsit for weighage; Duppa *v.* Gerard (1688), 1 Show. 78, Assumpsit for fees of knighthood.

[3] Shuttleworth *v.* Garrett, Comb. 151, 1 Show. 35, Carth. 90, 3 Mod. 240, 3 Lev. 261, S. C.

[4] 5 Mod. 444.

[5] 1 Ld. Ray. 502.

But Rokesby's opinion finally prevailed. The new action continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705,[1] and the "metaphysical notion"[2] of a promise implied in law became fixed in our law.

The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain to-day in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle.[3]

The most fruitful manifestations of this doctrine in the early law are to be found in the action of Account. One who received money from another to be applied in a particular way was bound to give an account of his stewardship. If he fulfilled his commission, a plea to that effect would be a valid discharge. If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery. If, for example, the money was to be applied in payment of a debt erroneously supposed to be due from the plaintiff to the defendant, either because of a mutual mistake, or because of fraudulent representations of the defendant, the intended application of the money being impossible, the plaintiff would recover the money in Account.[4] Debt would also lie in such cases, since, at an early period, Debt became concurrent with Account, when the object of the action was to recover the precise amount received by the defendant.[5] By means of the fiction of a promise implied in law *Indebitatus Assumpsit* became concurrent with Debt, and thus was established the familiar action of Assumpsit for money had and received to recover money paid to the defendant by mistake. Bonnel *v.* Fowke[6] (1657) is, perhaps, the first action of the kind.

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[1] Dupleix *v.* De Rover, 2 Vern. 540. [2] Starke *v.* Cheeseman, 1 Ld. Ray. 538.

[3] The readers of this Review will be interested to learn that this gap in our legal literature is about to be filled by Professor Keener's "Cases on the Law of Quasi-Contracts."

[4] Hewer *v.* Bartholomew (1597), Cro. El. 614; Anon. (1696), Comb. 447; Cavendish *v.* Middleton, Cro. El. 141, W. Jones, 196, s.c.

[5] Lincoln *v.* Topliff (1597), Cro. El. 644.

[6] 2 Sid. 4. To the same effect, Martin *v.* Sitwell (1690), 1 Show. 156, Holt, 25; Newdigate *v.* Dary (1692), 1 Ld. Ray. 742; Palmer *v.* Staveley (1700), 12 Mod. 510.

Although Assumpsit for money had and received was in its infancy merely a substitute for Account, it gradually outgrew the limits of that action. Thus, if one was induced by fraudulent representations to buy property, the purchase-money could not be recovered from the fraudulent vendor by the action of Account. For a time, also, *Indebitatus Assumpsit* would not lie in such a case. Lord Holt said in 1696: "But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus*."[1] His successors, however, allowed the action. Similarly, Account was not admissible for the recovery of money paid for a promise which the defendant refused to perform. Here, too, Debt and *Indebitatus Assumpsit* did not at once transcend the bounds of the parent action.[2] But in 1704 Lord Holt reluctantly declined to nonsuit a plaintiff who had in such a case declared in *Indebitatus Assumpsit*.[3] Again, Account could not be brought for money acquired by a tort, for example, by a disseisin and collection of rents or a conversion and sale of a chattel.[4] It was decided, accordingly, in Philips *v.* Thompson[5] (1675), that Assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in Assumpsit for the profits of the office, no objection being taken to the form of action.[6] Objection was made in a similar case in 1677, that there was no privity and no contract; but the Court, in disregard of all the precedents of Account, answered: "An *Indebitatus Assumpsit* will lie for rent received by one who pretends a title; for in such cases an Account will lie. Wherever the plaintiff may have an Account an *indebitatus* will lie."[7] These precedents were deemed conclusive in Howard *v.* Wood[8] (1678), but Lord Scroggs remarked: "If this were now an original case, we are agreed it would by no means lie." Assumpsit soon became concurrent with Trover, where the goods had been sold.[7]

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[1] Anon. Comb. 447.

[2] Brig's Case (1623), Palm. 364; Dewbery *v.* Chapman (1695), Holt. 35; Anon. (1696), Comb. 447.

[3] Holmes *v.* Hall, 6 Mod. 161, Holt. 36, s. c See, also, Dutch *v.* Warren (1720), 1 Stra. 406, 2 Burr. 1010, s. c.; Anon., 1 Stra. 407.

[4] Tottenham *v.* Bedingfield (1572), Dal. 99, 3 Leon. 24, Ow., 35, 83, s. c. Accordingly, an account of the profits of a tort cannot be obtained in equity to-day except as an incident to an injunction.

[5] 3 Lev. 191.

[6] Woodward *v.* Aston, 2 Mod. 95.

[7] Arris *v.* Stukely, 2 Mod. 260.

[8] 2 Show. 23, 2 Lev. 245, Freem. 473, 478, T. Jones, 126, s. c.; Jacob *v.* Allen (1703), 1 Salk. 27; Lamine *v.* Dorell (1705), 2 Ld. Ray. 1216. Phillips *v.* Thompson, *supra*, was overruled in Hitchins *v.* Campbell, 2 W. Bl. 827.

Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund." [1]

But one is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them. Nor is any distinction drawn, in general, between the two cases. In both of them the claim for the amount of the unjust enrichment would be provable in the bankruptcy of the wrong-doer as an equitable debt,[2] and would survive against his representative.[3] Nevertheless, the value of the goods consumed was never recoverable in *Indebitatus Assumpsit.* There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of Assumpsit for goods sold and delivered where the defendant had wrongfully consumed the plaintiff's chattels.

The same difficulty was not felt in regard to the quasi-contractual claim for the value of services rendered. The averment, in the count in Assumpsit, of an indebtedness for work and labor was proved, even though the work was done by the plaintiff or his servants under the compulsion of the defendant. Accordingly, a defendant, who enticed away the plaintiff's apprentice and employed him as a mariner, was charged in this form of action for the value of the apprentice's services.[4]

By similar reasoning, Assumpsit for use and occupation would be admissible for the benefit received from a wrongful occupation of the plaintiff's land. But this count, for special reasons connected with the nature of rent, was not allowed upon a quasi-contract.[5]

In Assumpsit for money paid the plaintiff must make out a payment at the defendant's request. This circumstance prevented

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[1] Moses *v.* MacFerlan, 2 Burr. 1005, 1012.

[2] *Ex p.* Adams, 8 Ch. Div. 807, 819.

[3] Phillips *v.* Homfray, 24 Ch. Div. 439.

[4] Lightly *v.* Clouston, 1 Taunt. 112. See, also, Gray *v.* Hill, Ry. & M. 420.

[5] But see Mayor *v.* Sanders, 3 B. & Ad. 411.

for a long time the use of this count in the case of quasi-contracts. Towards the end of the last century, however, the difficulty was overcome by the convenient fiction that the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.[1]

The main outlines of the history of Assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

J. B. Ames.

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[1] Turner *v.* Davies (1796), 2 Esp. 476; Cowell *v.* Edwards (1800), 2 B. & P. 268; Craythorne *v.* Swinburne (1807), 14 Ves. 160, 164; Exall *v.* Partridge (1799), 8 T. R. 308.